

ISSUES

The Fund raised the following issues in its application to the Board from the June 17, 2010, Order of the ALJ.

- “1) That the claimant has been provided medical and Higgins Stone is solvent.
- “2) That the Fund voluntarily paid medical.
- “3) The [Fund] has continued to provide medical, merely requesting referrals. See attached.
- “4) The Fund is not liable for penalties or interest K.S.A. 44-512(a) *Hall vs. City of Hugoton 2A [sic] Kan App 2nd 728.*”²

The Order of the ALJ allows attorney fees per claimant’s exhibit 1 to the Motion Hearing of June 17, 2010. The Fund, in its argument to the Board, also raised the issues dealing with the contention that respondent is financially solvent and able to pay for claimant’s ongoing and future medical bills. This issue does not appear to have been presented as an issue to the ALJ at the Motion Hearing on June 17, 2010, and was not addressed by the ALJ in the Order.

FINDINGS OF FACT

Claimant was employed by respondent as a heavy equipment operator. On August 3, 2001, claimant suffered injuries to his left shoulder and left knee as the result of a slip and fall. Claimant later underwent surgeries to the shoulder and knee and at various times was returned to light duty work. Claimant subsequently suffered injuries from work-related accidents to his right knee, neck and back. This record is replete with a multitude of examining and treating physicians for claimant’s various conditions. In the Order For Compensation dated March 2, 2006, the ALJ ordered that Dr. Glenn Amundson was to be the authorized treating physician. The Order included all referrals from Dr. Amundson until claimant was certified as having reached maximum medical improvement (MMI).

The Fund argues to the Board that medical treatment has been forthcoming on a regular basis without interruption. However, a review of the record tells another story. There have been ongoing disputes regarding the treatment which claimant was to receive. This matter went to preliminary hearing over Dr. Amundson’s request for a scooter for claimant and aqua therapy at the local YMCA. The matter later came to the Board over

² Application for Review before the Workers’ Compensation Board and Docketing Statement at 1-2.

claimant's contention that the Fund had violated the Order of the ALJ and that penalties were in order. While penalties were disallowed based on the holding of the Kansas Court of Appeals in *Hall*,³ the Fund was chastised for its failure to timely provide the medical treatment ordered.

Since that time, the ongoing need for medical treatment by claimant has resulted in an ongoing battle between claimant and the Fund. It is noted that the parties entered into a settlement on November 12, 2008, allowing ongoing medical treatment with Dr. Amundson as the authorized treating physician. This record does not support the Fund's contention that medical treatment has been provided willingly and in a timely fashion. Instead, it appears that both the treatment requested and the payment of that treatment have been slow in being provided.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-536(g) states:

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.

The Fund is correct, pursuant to *Hall*, that interest and penalties cannot be assessed against the Fund. However, K.S.A. 44-536(g) specifically allows the assessment of attorney fees, post award, against the Fund. At oral argument to the Board, the attorney

³ *Hall v. City of Hugoton*, 2 Kan. App. 2d 728, 587 P.2d 927 (1978).

for the Fund acknowledged that he had no dispute with either the hours of time submitted by the attorney for the claimant or the hourly rate being requested. It is noted that one comment by the Fund attorney, at the hearing before the ALJ, appears to question the hourly rate requested, but that objection was not raised to the Board.

The Board finds that the Order of the ALJ granting claimant attorney fees per claimant's exhibit 1 to the Motion Hearing of June 17, 2010, should be affirmed.

The Fund argues that respondent is financially able to pay for the ongoing medical treatment being provided to claimant. However, this record contains no evidence supporting the Fund's argument. Additionally, this issue was not raised to the ALJ and was not decided by the ALJ in the Order of June 17, 2010. The Fund's request for a determination that respondent is solvent and able to pay in this matter should be dismissed. If the Fund wishes a determination of this issue, it may be properly presented to the ALJ.⁴

CONCLUSIONS

The Order of the ALJ, allowing claimant attorney fees as listed in claimant's exhibit 1 of the Motion Hearing and pursuant to K.S.A. 44-536(g), is affirmed. The Fund's issues regarding respondent's ability to pay in this matter are dismissed as not properly before the Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated June 17, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

⁴ Additionally, once this question is determined by the ALJ, K.S.A. 44-532a(b) requires that any action by the commissioner of insurance, acting on behalf of the Fund against an employer for recovery of monies expended by the Fund, be brought in the district court of the county in which the accident occurred.

Dated this ____ day of January, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Judy A. Pope, Attorney for Claimant
 Jeff K. Cooper, Attorney for Respondent
 Mark W. Works, Attorney for Fund
 Brad E. Avery, Administrative Law Judge